(1) 83 - 1796

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

LEWIS L. GANNAWAY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the Fourth Amendment require the suppression of evidence found in accordance with the Fourth Amendment but in technical violation of a state statute relating to the execution of search warrants?

2. Do the rules established by this Honorable Court governing warrantless searches of residences incident to warrantless arrests have any application to searches of buildings under and pursuant to valid search warrants?

3. Does the opening of an unlocked screen door by officers armed with a valid search warrant and entry by them onto a screen porch for the purpose of serving the warrant on the householder at his open front door, violate the Fourth Amendment to the U. S. Constitution,

where the officers' failure to announce their purpose and authority before opening the screen door and entry to the porch constitutes a violation of a state statute requiring such announcement before "breaking" open a door?

4. Where officers enter a building to execute a valid search warrant without complying with state law requiring an announcement of their purpose and authority but immediately cure the illegality by identifying themselves and showing the occupant the warrant, does the Fourth Amendment Exclusionary Rule require the suppression of the evidence found in the subsequent search under the warrant?

THE PARTIES

In the Circuit Court of Calhoun County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court

of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Lewis L. Gannaway, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Calhoun County, Alabama, by Respondent's motion to suppress the evidence and have been at issue throughout these proceedings.

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The opinion of the Court of Criminal Appeals of Alabama affirming Respondent Gannaway's conviction is not as yet reported but will be reported as follows:

Gannaway v. State, ____ So. 2d ____ (Cr. App. Ala., 1983)

A copy of the same is submitted as Appendix "A" to this petition.

The opinion of the Supreme Court of Alabama reversing the Court of Criminal Appeals' decision and opinion in this case is not as yet reported but will be reported as follows:

Ex parte: Gannaway; In re: Gannaway v. State, ____ So. 2d ____ (S. Ct. Ala., 1984)

A copy of the same is submitted as Appendix "B" to this petition.

The order of the Court of Criminal Appeals of Alabama conforming its decision to that of the Alabama Supreme Court is not as yet reported but will be reported as follows:

Gannaway v. State, ___ So.2d ___ (Cr.app.Ala., 1984)

A copy of the same is submitted as Appendix "C" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing in this case was issued on March 9, 1984, (Appendix "B", page 28) and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

The Alabama Supreme Court held that the Respondent's Fourth Amendment rights were violated because the officers violated Section 15-5-9, Code of Alabama, 1975, in opening an unlocked screen door and entering the Respondent's screen porch to serve a valid search warrant. Said statute reads as follows:

> "§ 15-5-9. Authority of serving officer to break into house.
>
> "To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance."

STATEMENT OF THE CASE

The Respondent, Lewis L. Gannaway, was indicted for trafficking in

controlled substances by the Grand Jury of Calhoun County, Alabama, and pleaded not guilty. (R. pp. 266 & 292)

Prior to trial the Respondent moved to suppress the evidence found pursuant to the execution of a valid search warrant on the grounds that the officers executing the warrant had not complied with Section 15-5-9, Code of Alabama, 1975, in that they had entered the Respondent's screen porch without announcing their purpose and authority. The motion claimed that the violation of this statute worked an automatic violation of the Fourth Amendment.[1] After hearings, the motion

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1. "...Because execution of the search warrant was in violation of Alabama Code § 15-5-9 (1975), any evidence obtained in such search was illegally seized under Article I §5 of the Constitution of Alabama, the Fourth Amendment of the United States [Constitution] by way of the Fourteenth Amendment...." (R.p. 270)

was overruled. (R.pp. 270-271 & 292)

The cause came on for trial before Honorable Robert M. Parker, a circuit judge and a jury, on February 12, 1982. The Respondent was found and adjudged guilty and sentenced to six years imprisonment and a fine of $25,000.00. (R.pp. 298-299)

Appeal was taken to the Court of Criminal Appeals of Alabama, which on May 31, 1983, affirmed the conviction and sentence, finding that the officers' conduct violated neither the statute nor the Fourth Amendment. Gannaway v. State, ___ So.2d ___ (Cr.App. Ala., 1983); Appendix "A".

A writ of certiorari was sought by Respondent Gannaway from the Alabama Supreme Court. On February 10, 1984, that Court, by a bare majority, reversed

the Court of Criminal Appeals of Alabama.[2] The Alabama Supreme Court wrote, inter alia:

> "...It is unnecessary to repeat here the injunctions of the federal courts on the requirement of prior notice of authority and purpose on the part of law enforcement authorities when making forceful, as opposed to permissive, entry into private homes...." (Ex parte: Gannaway, ___ So.2d ___, ___; Appendix "B", page 21; emphasis supplied)

The Court went on to observe:

> "...Perhaps this [i.e. the officers' conduct] was, as the court below observed, consistent with the conduct of business or social visitors. That, however, is not the test to be applied in these instances. § 15-5-9, supra...." Ex parte: Gannaway, ___ So.2d ___, ___; Appendix "B", page 22)

The Court went on to hold:

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2. Four of the nine Justices of the Alabama Supreme Court dissented, arguing that the officers' conduct was reasonable within the meaning of the Fourth Amendment. (Appendix "B", pages 26-27)

"...On the record, we find that the requirments of § 15-5-9 were not met and that, accordingly, it was error to overrule the petitioner's motion to suppress the evidence seized in the search in question...." (Ex parte: Gannaway, ____ So.2d ____, ___; Appendix "B" pages 24-25).

The Petitioner State applied for rehearing; the same being denied on March 9, 1984. (Appendix "B"; page 28)

On April 10, 1984, the Court of Criminal Appeals conformed its decision to that of the Alabama Supreme Court. (Gannaway v. State ____ So.2d ____; Appendix "C")

STATEMENT OF THE FACTS

The general facts have never been in any serious dispute. The Court of Criminal Appeals of Alabama found the facts as follows:

> "... There was some difference between the testimony of Mr. and Mrs. Gannaway and the testimony of the officers as to the circumstances immediately preceding the execution of the search warrant, but there was little,if any, essential difference. The undisputed evidence shows that the heretofore named law enforcement officers converged on the home of defendant, his wife and their two young children, while the four were at home at approximately 3:45 P.M. on June 12, 1981; that two of the officers went to the front entrance and two of them went to the rear door of the residence. Entry at the front

entrance was made a few moments before the rear door was entered. There seems to be no dispute as to the validity of the entrance into the rear door. Mrs. Gannaway opened that door for the officers to enter, and they did so. The issue between the parties is as to the entrance into the front part of the house by Deputy Alexander and Officer Hembree. The residence was a modest frame building with a small screened-in front porch with space therein for about two chairs, which were on the porch at the time. There were concrete block steps from the front yard to the screen door, which opened outwardly and had an outside knob. The screen door was closed at the time the officers arrived. The wooden door into the living room of the house was open. When the officers arrived at the front

of the house, two children were in the screened-in porch. Upon their being asked where their father was, one of them said something about he was in the house; and one of them ... went back into the living room. The following is found in the testimony of Officer Hembree:

'Q. And then what happened?

'A. It was just about the same time that we could see him [defendant] coming across the living room to the threshold of the front door.

'Q. How far was he when you first saw him from you?

'A. It was, I guess, maybe five or six feet across the porch and then maybe ten feet on in the living room when we saw him.

'Q. And what direction did he proceed there in the living room?

'A. He was coming from the rear of the house, which was back toward the bathroom and kitchen

area. He came across the living room to the front door.

'Q. Now, when you saw the children there on the front porch did you knock at that time?

'A. No, sir; it was already somebody there to talk to.

'Q. Now, when you saw Mr. Gannaway approaching the threshold, what happened then?

'A. We stepped up on the porch, met him at the threshold, and Deputy Alexander gave him a copy of the search warrant, and stated that we had a search warrant for his residence.

'Q. Did you identify yourselves at any time?

'A. I displayed my badge and identification...." (Gannaway v. State, ___ So.2d; ___; Appendix "A", pages 6-9)

"...[T]here was practically no force exercised by the officer in the instant case. The screen door presented little opportunity for the officers to so knock

thereon as to be heard by anyone in the house itself, unless the officer had used the screen door as a knocker by repeatedly opening it and slamming it, which would have been highly unbecoming, frightening to the children and alarming to the neighborhood...." (Gannaway v. State, ___So.2d ___, ___; Appendix "A", page 11)

"...Actually, until they [i.e. the officers] had served the warrant on the defendant, they did no more and no less than what would have been expected of general business or social visitors. Even if their conduct can be correctly described as expeditious, it clearly was not precipitate or provocative...." (Gannaway v. State, ___ So.2d ___, ___; Appendix "A", page 12)

For its part, the Alabama Supreme

Court did not dispute these findings. That Court summarized the facts as follows:

> "...What happened here was that the officers asked some children who were inside the screened porch the whereabouts of their father. Upon being told that he was in the house, the officers, seeing the petitioner inside at the time, entered the residence and, displaying identification, handed the petitioner a copy of the search warrant...."
> (Ex parte: Gannaway, ___ So.2d, ___, ___; Appendix "B", pages 23-24).

SUMMARY OF THE ARGUMENT

1. The Respondent's claim has from the beginning been based on the Fourth Amendment. The Alabama Courts have consistently treated violations of the statute as being violations of the Fourth Amendment. E.g. Renolds v. State, 46 Ala. App. 77, 238 So.2d 557 (1970); cert den. 286 Ala. 740, 238 So.2d 560; Daniels v. State, 391 So.2d 1021, 1022-1023 (S. Ct. Ala., 1980) The Alabama Supreme Court cited and relied on federal authority for the effect of the violation of the state statute relating to the execution of search warrants. Therefore, this case presents the issue: Given that

the officers violated a state statute, did they ipso facto violate the Fourth Amendment?

2. In United States v. Caceres (440 U.S. 741, 59 L.Ed.2d 733, 99 S. Ct. 1465 [1979] tnis Honorable Court refused to allow the suppression of evidence obtained in violation of an administrative regulation, because (1) the violation did not reach constitutional proportions, (2) was a pure matter of form and (3) did not prejudice the substantive rights of the accused. The same is even more true in the instant case. Yet, the Alabama Supreme Court ruled that the Fourth Amendment required suppression of the evidence. The writ should issue because of the conflict with Caceres and because this case provides a

unique opportunity for this Honorable Court to address the relationship between the Fourth Amendment and other search and seizure rules.

3. Miller v. United States (357 U.S. 301, 2 L.Ed.2d 1332, 78 S. Ct. 1190 [1958]); Ker v. California (374 U.S. 23, 10 L.Ed.2d 726, 83 S. Ct. 1623 [1963]) and Sabboth v. United States (391 U.S. 585, 20 L.Ed.2d 828, 88 S. Ct. 1755 [1968]) are universally cited as requiring the suppression of evidence found under valid warrants where the officers' entry was in somewise illegal. However, these cases involved warrantless searches incident to warrantless arrests, and their reasoning is tied to that situation. There are fundamental differences between searches incident to warrantless arrests and searches under

valid search warrants. This Honorable Court has never had the opportunity to address whether the Fourth Amendment establishes any rules for the execution of search warrants. The writ should issue to address that question in this case.

4. If the Fourth Amendment establishes any rules for the execution of search warrants, such rules would be based on reasonableness, since the Amendment does not refer to execution of warrants. The actions of the officers in this case were not calculated to prejudice any interest which a knock and announce requirement could advance. It is most difficult to see how conduct by warrant-serving officers, which is consistent with that of social visitors, could be described as unreasonable. The

writ should issue to address this novel question.

5. Even if it is assumed that the officers in this case violated the Fourth Amendment, they obviously cured the error immediately. The writ should issue to determine the effect of a curing of a defect in the execution of a search warrant.

ARGUMENT

INTRODUCTION: THE FOURTH AMENDMENT EXCLUSIONARY RULE COMES FULL CIRCLE

In Mapp v. Ohio (367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684 84 A.L.R. 2d 933 [1961]) this Honorable Court was confronted with a police search, which would have done credit to the Nazi Gestapo. In that case, the Court read into the Fourteenth Amendment the Fourth Amendment Exclusionary Rule, thereby applying the rule to the states. The instant case represents a sort of milestone in the development of the Rule since Mapp. No one would argue that what the officers did in Mapp was acceptable, but here even the Alabama Supreme Court agreed that the officers' actions here were "...consistent with the conduct of business or social visitors...." (Appendix "B", page 22) Yet, the

Alabama Supreme Court ruled that the officers' technical violation of the state statute rendered the entire search under a perfectly valid search warrant a violation of the Fourth Amendment. This was the result of two factors: (1) The state courts' judicially appending the Alabama Statute to the Fourth Amendment of the U. S. Constitution, and (2) the Alabama Supreme Court's giving that statute a hypertechnical interpretation. Factor (2) is not, of course, subject to this Honorable Court's jurisdiction, but on factor (1) this Honorable Court is the supreme tribunal for review.

I.

THIS CASE PRESENTS AN ISSUE UNDER THE FEDERAL CONSTITUTION

From the time the Respondent first raised this search and seizure issue in

the Circuit Court of Calhoun County, his claim has been based on two premises: First, a claim that in entering the Respondent's screen porch without announcing their purpose and authority, the officers violated Section 15-5-9, Code of Alabama, 1975. Second, a claim that, since the officers violated Section 15-5-9, the entire search under the valid warrant, was a violation of the Fourth Amendment to the U. S. Constitution. In state court the Petitioner State contested both premises; here only the second premise is contested.

At least, since 1970 the Alabama Courts have treated violations of Section 15-5-9 as violations of the Fourth Amendment. See Renolds v. State, 46 Ala. App. 77, 238 So.2d 557 (1970); cert. den. 286 Ala. 740, 238 So.2d 560. In the instant case, the Alabama Supreme Court

relied, with one exception, on federal cases construing federal law. The one exception was Daniels v. State (391 So.2d 1021 [S. Ct. Ala., 1980]). In Daniels the Alabama Supreme Court addressed the execution of a search warrant and the applicability of Section 15-5-9 in these words:

> "...Code 1975, § 15-5-9 represents Alabama's version of the so-called knock and announce statute and provides in pertinent part that:
>
> "To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance....
>
> "The United States Supreme Court has extensively examined the constitutional significance of these statutes on at least three occasions. See, Miller v. United States, 357 U.S. 301, 78 s. Ct. 1190, 2 L.Ed.2d 1332 (1958), Ker v. California, 374 U.S. 23, 83 S. Ct. 1623, 10 L.Ed.2d 726 (1963), and

> Sabboth v. United States, 391 U.S. 585, 88 S. Ct. 1755, 20 L.Ed.2d 828 (1968)...In doing so the [U.S. Supreme] Court has declared these statutes to be of paramount importance in safeguarding the rights of individuals afforded under the Fourth Amendment to the United States Constitution...." (391 So.2d 1021, 1022-1023; emphasis supplied)

The Alabama Supreme Court decided this case under the Fourth Amendment to the United States Constitution. The general issue presented by this petition is: Given that the officers violated Section 15-5-9 of the Code of Alabama, 1975, did they ipso facto also violate the Fourth Amendment to the Constitution of the United States?

II.

REASONS FOR GRANTING THE WRIT

A.

CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT

Although the officers in this case

"...did no more and no less than what would have been expected of general business or social visitors...." (Appendix "A", page 12), their conduct was held by the Alabama Supreme Court to be a violation of the state statute. The Respondent has consistently argued and the Alabama Supreme Court agreed, that any violation of the statute was an ipso facto violation of the Fourth Amendment. This case, therefore, presents to this Honorable Court a unique opportunity to examine the relationship between the Fourth Amendment and statutes and other rules relating to the searches and seizures. Where there is a technical violation of the Fourth Amendment, the Constitution mandates the suppression of the evidence, but does the Constitution mandate the suppression of evidence found

in technical violation of a search and seizure statute which does not amount to a Fourth Amendment violation?

This Honorable Court as already addressed this issue in a slightly different context. In United States v. Caceres (440 U.S. 741, 59 L.Ed.2d 733, 99 S. Ct. 1465 [1979]) this Honorable Court examined a monitoring of conversations by an I.R.S. agent in admitted violation of I.R.S. regulations. In reversing the decisions of the lower courts suppressing the recordings of the conversations this Honorable Court emphasized three points:

1. While the monitoring of the conversations violated I.R.S. regulations, it did not violate the Fourth Amendment (440 U.S. 741, 449-451, 59 L.Ed.2d 733, 742-743)

2. The violation was "...purely one

of form, with no discernible effect in this case...." (440 U.S. 741, 752)

3. The accused suffered no prejudice to his substantive rights, although "...[h]e was... prejudiced in the sense that he would have been better off if all monitoring had been postponed until after...." proper approval had been received. (440 U.S. 741, 753, 59 L.Ed.2d 733, 744)

Each of these points is present in this case to an even stronger degree.

1. THE OFFICERS' ACTIONS DID NOT VIOLATE THE FOURTH AMENDMENT: Every society finds it necessary to clothe its law enforcement officers with special authority. Societies such as ours develope bodies of law designed to guarantee that such special authority is used by officers to protect citizens'

rights and not to abuse or exploit the people. This is the purpose of the Fourth Amendment and all the other constitutional provisions, the statutes, the court decisions and rules, the administrative regulations and police procedures regulating searches and seizures. However, this whole body of law is based on the assumption that police officers must on occasion do things which are forbidden to private citizens. The plain words of the statute applied by the Alabama Supreme Court in this case fit into this precise pattern: The statute on its face authorizes officers to break doors in order to serve a search warrant, something forbidden to private citizens but places conditions on the exercise of this authority. The Alabama Supreme Court's decision in this case is unique

in holding that conduct acceptable for private citizens is illegal for officers armed with a search warrant. No decision by any court construing the Fourth Amendment has ever suggested that the Amendment outlaws conduct by police officers that is permitted to private citizens. There is simply no way that a valid argument can be made that Respondent Gannaway's Fourth Amendment rights were in any wise abridged.

2. THE OFFICERS' VIOLATION WAS PURELY ONE OF FORM: The whole problem in this case is that the officers opened the screen door and entered the screen porch to serve the warrant. Had they served the warrant at the screen door instead of at the open front door, the statute would not have been violated. A more pure matter of form cannot be imagined.

3. RESPONDENT GANNAWAY SUFFERED NO PREJUDICE TO HIS SUBSTANTIVE RIGHTS: These officers went to the Gannaway house to serve a search warrant. Respondent Gannaway had no right to refuse the officers admittance. In opening the screen door and entering the screen porch, the officers did no damage to the building. Unlike the situation in Caceres, it cannot be said that Respondent Gannaway would have been any better off whether the warrant was served at the front door, the screen door or out on the front lawn.

In appending this hypertechnically interpreted statute to the Fourth Amendment, the Alabama Supreme Court ruled contrary to United States v. Caceres (440 U.S. 741, 59 L.Ed.2d 733, 99 S. Ct. 1465 [1979]). In addition, this

case presents a unique opportunity for this Honorable Court to address the relationship between search and seizure statutes and the Fourth Amendment. For both reasons the writ ought to issue in this case.

B.

A NOVEL QUESTION: TO WHAT EXTENT DO THE DECISIONS OF THIS HONORABLE COURT GOVERNING WARRANTLESS SEARCHES OF RESIDENCES APPLY TO SEARCHES UNDER VALID SEARCH WARRANTS?

In Miller v. United States (357 U.S. 301, 2 L.Ed.2d 1332, 78 S. Ct. 1190 [1958]) this Honorable Court addressed validity of a search after officers broke in the door to a residence in order to effect a warrantless arrest. The Court decided that under the federal statute, the arrest was illegal, since the officers did not demand entry and had not announced their purpose and authority

before breaking the door. A similar decision, also under the federal statute, was reached in Sabboth v. United States (391 U.S. 585, 20 L.Ed.2d 828, 88 S. Ct. 1755 [1968]). However, in the only case where this Court has had the opportunity to examine the issue in a pure Fourth Amendment context, the Court split 4-1-4 to uphold a search incident to a warrantless arrest after a "no knock" entry. Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S. Ct. 1623 (1963) In Ker the plurality emphasized the distinction between federal law, which governs federal courts and the Constitution, which governs all courts. (374 U.S. 23, 31 ff, 10 L.Ed.2d 726, 736 ff). Miller, Sabboth and Ker all addressed searches incident to warrantless arrests. The legality of such searches depends on the

legality of the arrests, and the legality of a warrantless arrest inside a building depends, in part, on the legality of the entry. As this Court observed in Miller:

> "...The Government contends that there was probable cause for arresting the petitioner and that the marked currency was seized as an incident to a lawful arrest....
>
> "The lawfulness of the arrest of petitioner depends upon the power of the arresting officers to 'break' the door of a home in order to arrest without a warrant a person suspected of having committed narcotics offenses...." (357 U.S. 301, 304-305, 2 L.Ed.2d 1332, 1336)

These cases dealing with searches incident to warrantless arrests, therefore, throw no light at all on the question of what duties the Fourth Amendment imposes on officers who are executing valid search warrants. This Honorable Court has never had the opportunity to examine this issue.

Yet, the lower courts have generally treated Miller, Ker and Sabboth as interpreting the Fourth Amendment to require an announcement of purpose and authority before entering a building to serve a warrant, unless there is a justification for dispensing with the announcement. The lower courts make no distinction between entries pursuant to warrants and warrantless entries. See Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966)[3]; United States v. Mendez, 437 F.2d 85 (5th Cir., 1971)[4];

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3. The statutory announcement requirement could be dispensed with where officers pulled a party from a darkened telephone booth in order to serve a valid warrant for the person's arrest, since an announcement could have endangered the officers. (366 F.2d 923, 928)

4. "Knock and announce" could be dispensed with where offices intent on serving a valid search warrant observed subject asleep in the building with his hand near a pistol. (437 F.2d 85, 86)

United States v. Singleton, 439 F.2d 381 (3rd Cir., 1971)[5]; United States v. Allende, 486 F.2d 1351 (9th Cir., 1973)[6] and Daniels v. State, 391 So.2d 1021 (S. Ct. Ala., 1980)[7]. Each of these cases was cited and relied on by the Alabama Supreme Court in the instant case. Each of these cases cited Miller, Ker and Sabboth for the proposition that the Fourth Amendment required an announcement of purpose and authority incident to entering a building in order to serve a valid warrant. However, as already noted neither Miller nor Ker nor Sabboth

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5. Announcement may be dispensed with where it would be a useless gesture. (439 F.2d 381, 385)

6. Ten second delay between announcement and entry to serve valid search warrant acceptable.

7. Breaking in a door to serve a valid search warrant after announcement of purpose and authority and delay of two or three minutes was held acceptable. (391 So.2d 1021, 1022)

concerned warrants at all.

There are fundamental differences between arrests without warrants and searches incident thereto on the one hand and searches pursuant to warrants on the other. In making an arrest without a warrant an officer acts on his own authority as conferred by law. In executing a warrant, an officer is carrying out a court order. In acting without a warrant, an officer initially determines probable cause for himself; in the case of a warrant, a neutral detached magistrate has determined probable cause. The legality of a search incident to an arrest depends on the legality of the arrest. See the language quoted from Miller at page 32, above. The legality of a search under a valid warrant depends only on the warrant. Yet, the lower courts, following Miller, Ker and Sabboth, apply the same rules to the

execution of warrants that they apply to searches incident to warrantless arrests.

This Honorable Court has never addressed the issue of whether the Fourth Amendment makes any provision for the mechanics of the execution of search warrants. The issue of the relationship between statutes regulating to the execution of search and arrest warrants and the Fourth Amendment arises often in the Lower Courts. This case, involving a violation of the statute by conduct that was clearly reasonable, provides a unique opportunity to address this issue in a pure Fourth Amendment context.

C.

A NOVEL QUESTION: WHETHER THE CONDUCT OF THE OFFICERS IN THIS CASE WAS REASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT

Assuming that the Fourth Amendment

establishes standards for the execution of search warrants, then those standards would be based on reason, since the Amendment makes no specific reference to execution of valid warrants: Officers executing search warrants ought to conduct themselves reasonably. The reasons for a knock and announce requirement in the execution of search warrants are threefold: (1) To provide protection against officers' executing warrants on the wrong premises; (2) To prevent unnecessary breeches of privacy and (3) To avoid unnecessary destruction of property, which would result from needlessly breaking doors.

In this case none of these interests were threatened by the officers' actions. The officers did not break the Respondent's screen door but opened it. There

was, therefore, no destruction of property at all. The only area of the Repondent's house the officers entered, prior to identifying themselves and displaying the warrant, was a screen porch; screen porches are not designed for privacy. On the contrary, they are designed to allow the occupants to see and be seen. Finally, if on presenting the Respondent with the warrant, the officers had learned that they were at the wrong house, no harm had been done which could not be corrected by an apology.

The state courts in this case observed that the officers' conduct was consistent with that of a social or business visitor. As discussed under "A", above, it is most, difficult to see how conduct which is reasonable for a business visitor can be described as

unreasonable for an officer whose business is the execution of a court order.

As discussed above in subsection "B", above, this Honorable Court has never had an occasion to address the Fourth Amendment requirements in the execution of search warrants. This case presents a unique opportunity to address the issue of whether or not conduct which violates a state statute nonetheless is reasonable under the Fourth Amendment.

D.

A NOVEL QUESTION: WHAT WAS THE EFFECT OF THE OFFICERS' CURING THEIR OMISSION PRIOR TO THE ACTUAL SEARCH UNDER THE WARRANT?

Human nature being what it is, even the most careful officers will from time to time err in a search. Usually, such errors are uncorrectable. However, the error committed by the officers in

this case, assuming it reached Fourth Amendment proportions, was subject to correction and was, in fact, corrected within seconds of its commission. Had the officers displayed their badges and warrant from outside the screen door, rather than from inside it, the execution of the search warrant would have been legal. The fact that the statutorily required action by the officers happened inside the screen door, did not in anywise prejudice the respondent. The respondent had no right to refuse admittance to the officers, who were acting under a court order. His property was not damaged by the officers' actions nor was his privacy breeched.

If there were indeed a Fourth Amendment violation in this case, the writ should issue to determine the effect of the curing of a Fourth Amendment

violation which did not prejudice the accused.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Supreme Court of Alabama in this case and that of the Court of Criminal Appeals conforming thereto, present conflicts with prior decisions and opinions of this Honorable Court on the relationship between nonconstitutional search and seizure law and the Fourth Amendment to the U.S. Constitution and incorrectly resolved several novel questions under the Fourth Amendment. For these reasons, the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the

decisions and opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the officers in this case violated the Fourth Amendment.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of _____, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Lewis L. Gannaway, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Hon. Frances Heidt
Hon. Donald W. Stewart
Attorneys at Law
2017 Morris Avenue
Birmingham, Alabama 35203

_____
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

LEWIS L. GANNAWAY, RESPONDENT

APPENDICIES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

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NO._____

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APPENDIX "A"

MAY 31, 1983

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

7 DIV. 944

Lewis L. Gannaway

v.

State

Appeal from Calhoun Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

A jury found defendant (appellant) guilty on a trial under an indictment that charged in pertinent part:

> "Lewis L. Gannaway ... did knowingly and unlawfully possess cannabis, a controlled substance, in excess of one kilogram or 2.2 pounds, to-wit: 3,235.46 grams, contrary to and in violation of the Alabama Uniform Controlled Substance Act, in violation of Section 20-2-80 of the Code of Alabama."

In addition to the fine of $25,000.00 assessed by the jury by its verdict, the trial court fixed defendant's punishment at imprisonment for six years.

Code of Alabama, § 20-2-80 provides:

> "Except as authorized in chapter 2, Title 20:
>
> "(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as 'trafficking in cannabis.' If the quantity of cannabis involved;
>
> > "a. is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00."

The first of two issues presented by appellant is thus stated in appellant's brief:

"Whether the overruling of appellant's motion to suppress based on

the failure of the officers to comply with the requisites of the knock and announce statute while executing the search warrant herein was reversible error."

> "Ala. Code §§ 15-5-9, 28-1-2 (1975); U.S. Const. amends.IV, V, XIV; Ala. Const. Art. I, § 5; Daniels v. State, 391 So.2d 1021 (Ala. 1980); Reynolds v. State, 46 Ala. App. 77, 238 So.2d 557 (1970)."

By a profound discussion and thorough consideration of numerous pertinent authorities, the Alabama Supreme Court in the cited opinion of Daniels v. State, per Justice Beatty, paved the way for a correct decision of the first issue presented by appellant in the instant case. In Daniels v. State and in the instant case, Code 1975, § 15-5-9, was and is the focal point of the applicable law, which provides:

> "To execute a search warrant, an officer may break open any

door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance."

Clearly applicable to the evidence in the instant case of the circumstances of the execution of the search warrant is the following statement in Daniels v. State, at 391 So. 2d 1023:

"...In executing a search warrant, circumstances may exist which justify an unannounced and immediate entry. See, e.g., United States v. Singleton, 439 F.2d 381 (3rd Cir. 1971); United States v. Garcia, 437 F.2d 85 (5th Cir. 1971); Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966); see generally, Annot., 21 A.L.R. Fed. 820 (1974). Likewise, exigencies may justify a forcible entry after waiting only a brief time after announcement. See, e.g., United States v. Allende, 486 F.2d 1351 (9th Cir. 1973); United States v. Cruz, 265 F. Supp. 15 (W.D. Tex. 1967); United States v. Poppit, 227 F. Supp. 73

(D. Del. 1964). Therefore, what constitutes a sufficient compliance with the announcement statute is necessarily dependent upon the peculiar circumstances confronting the executing officer. Laffitte v. State, 370 So.2d 1108 (Ala. Cr. App. 1979)...."

Evidence bearing on the question of the validity of the execution of the search warrant was presented in three separate phases of the case, i.e., (1) on the hearing of the motion to suppress the evidence obtained by the search, (2) evidence presented after the trial of the case commenced but out of the presence of the jury, and (3) evidence presented in the presence of the jury. As to (1), the evidence consisted of the testimony of Mrs. Gannaway, defendant's wife, and Officer Michael Hembree of the Anniston Police Department. As to (2), the witnesses named as to (1) and the defendant testified. As to (3), the

witnesses were Deputy John Alexander of the Calhoun County Sheriff's Department, Agent Don Walden of the Alabama Bureau of Investigation, Narcotics Div., and Sgt. Dryden of the Anniston Police Department.

There was some difference between the testimony of Mr. and Mrs. Gannaway and the testimony of the officers as to the circumstances immediately preceding the execution of the search warrant, but there was little, if any, essential difference. The undisputed evidence shows that the heretofore named law enforcement officers converged on the home of defendant, his wife and their two young children, while the four were at home at approximately 3:45 P.M. on June 12, 1981; that two of the officers went to the front entrance and two of them went to the rear door of the residence.

Entry at the front entrance was made a few moments before the rear door was entered. There seems to be no dispute as to the validity of the entrance into the rear door. Mrs. Gannaway opened that door for the officers to enter, and they did so. The issue between the parties is as to the entrance into the front part of the house by Deputy Alexander and Officer Hembree. The residence was a modest frame building with a small screened-in front porch with space therein for about two chairs, which were on the porch at the time. There were concrete block steps from the front yard to the screen door, which opened outwardly and had an outside knob. The screen door was closed at the time the officers arrived. The wooden door into the living room of the house was open. When the officers arrived at the front of the house, two

children were in the screened-in porch. Upon their being asked where their father was, "One of them said something about he was in the house; and one of them, I believe, went back into the living room." The following is found in the testimony of Officer Hembree:

> "Q. And then what happened?
>
> "A. It was just about the same time that we could see him [defendant] coming across the living room to the threshold of the front door.
>
> "Q. How far was he when you first saw him from you?
>
> "A. It was, I guess, maybe five or six feet across the porch and then maybe ten feet on in the living room when we saw him.
>
> "Q. And what direction did he proceed there in the living room?
>
> "A. He was coming from the rear of the house, which was back toward the bathroom and kitchen area. He came across the living room to the front door.

"Q. Now, when you saw the children there on the front porch did you knock at that time?

"A. No, sir; it was already somebody there to talk to.

"Q. Now, when you saw Mr. Gannaway approaching the threshold, what happened then?

"A. We stepped up on the porch, met him at the threshold, and Deputy Alexander gave him a copy of the search warrant, and stated that we had a search warrant for his residence.

"Q. Did you identify yourselves at any time?

"A. I displayed my badge and identification."

In Daniels v. State, supra, the Alabama Supreme Court upheld the action of the officers in entering the residence at which appellant resided and serving a search warrant upon him. In many respects, the circumstances were similar to those in the instant case. In both cases, two officers went to the front

door and two to the rear. In both cases, the complaint of defendant was as to the entry into the front door. In the cited case, no screen door or screened porch was involved. According to the undisputed evidence therein by the officer effectuating the entry into the front door, he "knocked on the front door approximately four or five times and received no response" and then he "announced himself as a deputy sheriff ... with a search warrant for the residence." No one answered the door, and the officer, "having heard movement within the house ... hit the door with his shoulder and forced his way in." According to the undisputed testimony of the officer, "Approximately two or three minutes elapsed from the time he knocked on the door until the time he made his forcible entry." In the fact that the

officer in Daniels v. State, supra, actually knocked on the door, the case was more favorable to the State than the instant case. However, in several other respects, the instant case is more favorable to the State than the Daniels case. There was considerable force exercised by the officer in the Daniels case; there was practically no force exercised by the officer in the instant case. The screen door presented little opportunity for the officers to so knock thereon as to be heard by anyone in the house itself, unless the officer had used the screen door as a knocker by repeatedly opening it and slamming it, which would have been highly unbecoming, frightening to the children and alarming to the neighborhood.

We find much more in Daniels v. State, supra, to uphold the execution of

the search warrant than to vitiate it, both in the opinion itself and in the numerous authorities cited therein. In most of said authorities, execution of the search warrant there involved was upheld. In general, we are persuaded that the conduct of the officers in going onto the porch and into the house conformed to legal requirements. Actually, until they had served the warrant on the defendant, they did no more and no less than what would have been expected of general business or social visitors. Even if their conduct can be correctly described as expeditious, it clearly was not precipitate or provocative. Specifically, we conclude that they did not violate Section 15-5-9 of Alabama Code 1975.

The second issue presented by appellant, by which he asserts that the trial court should not have submitted the case to the jury has two prongs:

> "(1) Ala. Code § 20-2-80 violates the mandate of separation of powers contained in Ala. Const. Art. iii, § 43 (1901) and (2) that 'it was the State's burden to prove that the weight of the contraband minus the prohibited matter was in excess of the statutory threshold of 2.2 pounds.'"

Both of these contentions have been recently decided adversely to appellant in Dickerson v. State, Ala. Cr. App., 414 So.2d 998 (1982).

As to the contention that the particular statute violates the doctrine of separation of powers expressed in Article III, § 43 of the Alabama Constitution of 1901, it was held, after a thorough consideration of the question

and the citation of abundant authorities as to it:

> "Consequently, we find § 20-2-80(1) not unconstitutionally vague or indefinite as to its sentencing scheme or violative of the separation of powers doctrine of § 43, supra."
>
> Dickerson v. State, supra, at 414 So.2d 1005.

In urging that the evidence in the instant case does not show that the marijuana found in the possession of defendant was in excess of 2.2 pounds, in that the evidence disclosed that the amount included "stems, stalks and seeds," appellant challenges the applicability here of that part of the opinion in Dickerson v. State, supra, in which, in reliance upon numerous authorities, it is stated:

> "It is well etablished that the burden is upon the appellant to establish and

> bring himself within any exclusion which is found not in the enacting clause defining a crime but rather in a subsequent clause or statute. Specifically, he must establish that the marijuana seized from his residence contained exclusable matter falling within the definition of such under § 20-2-2(15)...."

Without agreeing with appellant and without entering into an extensive discussion of the question which appellant's brief on the point would require, we note that, irrespective of the party upon whom the burden was in the particular respect under consideration, there was ample evidence that the "stems, stalks and seeds" of the marijuana possessed by defendant were not of sufficient weight to have prevented the total weight of the particular controlled substance from exceeding 2.2 pounds. This is demonstrated by part of the

testimony of Lt. Richard Townsley, who was in charge of the Police Department Crime Laboratory, while being cross-examined by defendant's attorney out of the presence of the jury, in pertinent part as follows:

> "Q. I'm asking you, though, if it is not a fact that those particular elements of the plant, which were in this plant material when you weighed it, do not contain the TCH or --
>
> "A. THC.
>
> "Q. THC?
>
> "A. Stems, stalks and seeds ungerminated would not contain THC, to my knowledge.
>
> "Q. You didn't perform any test on this matter in this material to determine, say the seeds, for instance whether they had any capability to germinate?
>
> "A. No, sir. There was no need to; there was enough of the other material.
>
> "Q. Just respond to the question. You didn't perform any test on that?

"A. No, sir."

In concluding our consideration of appellant's contention that the evidence failed to show that defendant possessed "cannabis, a controlled substance, in excess of one kilogram or 2.2 pounds, to-wit: 3,234.46 grams," we note that it was only necessary for the weight of the cannabis to have been approximately one-third of the total weight of the material that was seized and weighed. Furthermore, it should be noted that, apparently with the approval of both parties, the court orally charged the jury on the lesser included offense of possession of marijuana and gave the jury three forms of verdict, one finding the defendant not guilty, one finding defendant guilty of trafficking in cannabis and one finding him guilty of possession of marijuana.

No issue is presented that requires a reversal of the judgment of the trial court, which should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of § 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court.

AFFIRMED.

ALL THE JUDGES CONCUR

APPENDIX "B"

FEBRUARY 10, 1984

THE STATE OF ALABAMA ----- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte: Lewis L. Gannaway

82-980

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Lewis L. Gannaway

v.

State of Alabama)

BEATTY, JUSTICE.

Certiorari was granted to ascertain whether the Court of Criminal Appeals has properly applied the provisions of Code of 1975, § 15-5-9, and our decision in Daniels v. State, 391 So.2d 1021 (Ala. 1980), to the facts of this case. We

reverse and remand.

In his petition for the writ of certiorari, the petitioner presented two issues, the first being:

> "Whether the overruling of appellant's motion to suppress based on the failure of the officers to comply with the requisites of the knock and announce statute while executing the search warrant herein was reversible error."

In addition to the facts recited in the opinion below, we have before us additional facts properly presented under Rule 39(k), A.R.A.P., in petitioner's application for rehearing below.

It is clear from the record that the officers who entered the petitioner's home through the front screen door neither "knocked" nor "announced." The State now defends the entry on the ground

that the officers had "talked to the two children" before entering, and in any case, "literal compliance with § 15-5-9 has never been required." In either event, it is urged, the procedure used to permit entry of the petitioner's premises complied with Daniels v. State, supra, recognized by the court below as the focal point of the applicable law. It is unnecessary to repeat here the injunctions of the federal courts on the requirement of prior notice of authority and purpose on the part of law enforcement authorities when making forceful, as opposed to permissive, entry into private homes. Nor is it necessary to discuss at length the exceptions which, in certain circumstances, may exist to justify an unannounced and

immediate entry. That aspect of this area of search and seizure law was sufficiently explored in Daniels, supra. It should be recalled that Daniels, itself, involved not an unannounced entry, but an entry which occurred two or three minutes after the officer had knocked on the door and announced his authority, knowing that someone was inside the residence. Here, there was never any attempt by the officers to announce their authority and purpose. Indeed, Officer Hembree testified that he did not knock because there "was already somebody there to talk to." Perhaps this was, as the court below observed, consistent with the conduct of business or social visitors. That, however, is not the test to be applied in these instances. § 15-5-9, supra.

Nor does the record demonstrate any necessity for an unannounced entry. The officers saw the defendant approaching the screened porch from the living room. There was no evidence that any announcement or delay on their part would alert him or place them in peril, cf. United States v. Mendez, 437 F.2d 85 (5th Cir. 1971); Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), or that the petitioner knew their identity and purpose, or that the officers entertained a reasonable belief that any announcement of purpose would lead to destruction of the evidence, United States v. Singleton, 439 F.2d 381 (3rd Cir. 1971), or that their announcement would have been met with a refusal. Cf. United States v. Allende, 486 F.2d 1351 (9th Cir. 1973) (after announcement officers heard "scampering" sounds). What happened here

was that the officers asked some children who were inside the screened porch the whereabouts of their father. Upon being told that he was in the house, the officers, seeing the petitioner inside at the time, entered the residence and, displaying identification, handed the petitioner a copy of the search warrant. Those circumstances do not justify this entry through the front screen door.

The State, moreover, does not contend that there was any permissive entry by police officers through the back door. The record discloses that following Officer Hembree's entry through the front door, Mrs. Gannaway unlocked the rear door to the house on the call of another officer who said, "you can unlock this door now."

On the record, we find that the requirements of § 15-5-9 were not met and

that, accordingly, it was error to overrule the petitioner's motion to suppress the evidence seized in the search in question. Having so found, we find it is unnecessary to consider the other alleged error raised by the petitioner. Accordingly, the decision of the Court of Criminal Appeals must be, and it hereby is, reversed, and this cause is remanded to that court with directions to award the petitioner a new trial. It is so ordered.

REVERESED AND REMANDED WITH DIRECTIONS.

Torbert, C.J., Jones, Embry, and Adams, JJ., concur, Maddox, Faulkner, Almon, and Shores, JJ., dissent.

MADDOX, JUSTICE (Dissenting).

Petitioner, pursuant to Rule 39(k), A.R.A.P., requested the Court of Criminal Appeals to add facts to its opinion, including these:

> "On the afternoon of June 12, 1981, Lewis Gannaway in the bathroom at his home, when his wife told him that she had just seen someone running up the driveway. Gannaway left the bathroom, which was at the rear of his home, and proceeded through a hall and through the kitchen into his living room.
>
> "Appellant entered his living room at the same time Officer Hembree of the Anniston Police Department was entering the room from the opposite side of the room. The only other people in the room were Appellant's two children, who were watching television at the time; his wife was in the kitchen. Appellant had never seen Hembree before, and recognized him only as a stranger dressed in civilian clothes. Because Officer Hembree entered the room

> simultaneously with Appellant, Appellant had no opportunity to elect whether or not to admit Hembree to the room. Hembree was already in the house by the time Appellant saw him because Hembree had not knocked prior to entering."

According to petitioner's own version of the facts, his wife "saw someone running up the driveway." These facts, and other facts in the opinion of the Court of Criminal Appeals, in and of themselves, tend to support the reasonableness of the officer's conduct on the occasion complained of. I believe the Court of Criminal Appeals correctly construed Daniels. I would affirm.

Faulkner, Almon and Shores, JJ., concur.

March 9, 1984

THE STATE OF ALABAMA ----------
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

82-980

EX PARTE: LEWIS L. GANNAWAY
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Lewis L. Gannaway v. State of Alabama)

IT IS ORDERED that the application for rehearing filed in the above cause on February 24, 1984, be, and the same is hereby, overruled. NO OPINION.

BEATTY, J. - TORBERT, CJ., JONES, EMBRY AND ADAMS, JJ., CONCUR; MADDOX, FAULKNER, ALMON AND SHORES, JJ., DISSENT.

APPENDIX "C"

APRIL 10, 1984

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1983-84

7 Div. 944

Lewis L. Gannaway

v.

State

Appeal from Calhoun Circuit Court

SAM TAYLOR, JUDGE

In compliance with the direction of the Supreme Court of Alabama in Ex Parte Gannaway, [Ms. 82-980, February 10, 1984], ___ So.2d ___ (Ala. 1984), the judgment of the trial court is reversed and the cause remanded with directions to

award the appellant a new trial.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of May, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Lewis L. Gannaway, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

Hon. Frances Heidt
Hon. Donald Stewart
Attorneys at Law
2017 Morris Avenue
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

(3)

NO. 83-1796

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

LEWIS L. GANNAWAY, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

SUPPLEMENT TO THE PETITION

OF

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IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1983

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SUPPLEMENTAL REASON FOR GRANTING THE WRIT: CONFLICT WITH SEGURA V. UNITED STATES (___ U.S. ___ [1984]), DECIDED JULY 5, 1984.

As outlined in the Petition, the officers went to the Respondent's house to serve a valid search warrant. Although the officers' conduct in serving the warrant was found by the state courts to be "...no more and no less than what would have been expected of general business or social visitors...." (Gannaway v. State, 448 So.2d 409, 412 [Cr.App.Ala., 1983] and Ex parte: Gannaway, 448 So.2d 413, 414 [S.Ct.Ala., 1984]), it was nonetheless in technical violation of state law. Ex parte: Gannaway, above. The basic issue in this case is whether the Fourth Amendment requires suppression of evidence found pursuant to a valid warrant, which is served after an illegal entry by the serving officers.

In Segura v. United States (___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 52 U.S. L.Wk. 5128 [1984]), decided July 5, 1984, this Honorable Court decided that an illegal entry and seizure of a home did not, under the Fourth Amendment, require the suppression of evidence found in a subsequent search under a valid warrant. The search was held to be legal in Segura, because the warrant was based on information obtained prior to the illegal entry and was not, therefore, based on the illegality, even though the warrant was issued after the illegal entry. In the instant case, the valid warrant was issued prior to the entry. Since an effect cannot proceed its cause, the warrant was obviously not based on the entry.

The decision and opinion of the Honorable Supreme Court of Alabama cannot

be reconciled with this Honorable Court's decision in Segura.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, again respectfully submits that the decisions and opinions of the Honorable Supreme Court of Alabama in this case and of the Court of Criminal Appeals conforming thereto, present conflicts with prior decisions and opinions of this Honorable Court and incorrectly resolved several novel questions under the Fourth Amendment. For these reasons, the Petitioner again prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of

said Courts to the extent that the same hold that the conduct of the officers in this case violated the Fourth Amendment or, in the alternative, will remand this cause for reconsideration in light of Segura v. United States, above.

Respectfully submitted,

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ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of July, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Lewis L. Gannaway, Petitioner, by mailing same to them, first class postage prepaid and addressed as follows:

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IN THE SUPREME COURT OF THE UNITED STATES

NO. 83-1796

STATE OF ALABAMA,

Petitioner,

v.

LEWIS L. GANNAWAY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals of Alabama affirming the trial court is reported as follows:

> Gannaway v. State, 448 So.2d 409 (Ala. Cr. App. 1983).

2. The opinion of the Supreme Court of Alabama reversing the decision of the Court of Criminal Appeals of Alabama is reported as follows:

> Ex Parte Lewis L. Gannaway (Re: Lewis L. Gannaway v. State of Alabama), 448 So.2d 413 (Ala. 1984).

3. The order of the Court of Criminal Appeals of Alabama conforming its decision to that of the Supreme Court of Alabama is reported as follows:

> Gannaway v. State, 448 So.2d 416 (Ala. Cr. App. 1984).

JURISDICTION

Petitioner asserts only that jurisdiction is invoked pursuant to 28 U.S.C. § 1257. Because the Alabama Supreme Court's holding was based upon adequate, non-federal grounds, jurisdiction is not proper under 28 U.S.C. § 1257, as will be explained.

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari to review a decision based on state law, independent of federal grounds?

2. Whether this Court should depart from its long-standing practice of refusing to grant certiorari to review pure questions of fact decided below, in the

absence of exceptional circumstances?

3. Should this Court grant certiorari to compare the holding herein with that of United States v. Caceres, 440 U.S. 741 (1979), when Caceres addresses an issue totally unrelated to that decided by the Alabama Supreme Court?

4. Should this Court grant certiorari when no important or novel fourth amendment issues have been presented by the State's petition?

5. Should this Court grant certiorari to compare the holding herein to that of Segura v. United States, ____ U.S. _____, 104 S.Ct. 3380 (1984), the holding of which is not applicable to this case?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section One of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The Alabama Supreme Court held that the officers failed to comply with the require- ments of Ala. Code § 15-5-9 (1975), and that, accordingly, the trial court erred by over- ruling the motion to suppress the evidence seized during the search in question.

Ala. Code § 15-5-9 (1975), provides as follows:

> To execute a search

> warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance.

ARGUMENT

I. THE STATE'S PETITION SEEKS REVIEW OF A PURELY FACTUAL QUESTION DECIDED PURSUANT TO STATE LAW BY THE ALABAMA SUPREME COURT.

The Alabama Supreme Court granted certiorari only "to ascertain whether the Court of Criminal Appeals has properly applied the provisions of Code of 1975, § 15-5-9, and [their] decision in Daniels v. State, 391 So.2d 1021 (Ala. 1980), to the facts of this case." Ex parte Gannaway, 448 So.2d 413, 414 (Ala. 1984). That Court

held that the police officers failed either to knock or announce prior to their entry into Gannaway's home to execute a search warrant, and that they made no attempt to comply with the statute. The Court also held that the evidence disclosed no facts which supported or justified their unannounced entry. Id.

This Court "customarily accept[s] the factual findings of state courts in the absence of 'exceptional circumstances.' " California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 111-12 (1980) (citations omitted). The decision of the Alabama Supreme Court to suppress the evidence was based on its view that as a matter of fact the executing officers violated, without

justification, the Alabama "knock and announce" statute, Ala. Code § 15-5-9 (1975), and its previous opinion in Daniels v. State, 391 So.2d 1021 (Ala. 1980), rather than the Fourth Amendment. The decision to exclude evidence obtained in violation of state law thus rested on adequate and independent state grounds and certiorari should be denied. Herb v. Pitcairn, 324 U.S. 117 (1945).

II. UNITED STATES V. CACERES, 440 U.S. 741 (1979) IS TOTALLY UNRELATED TO THE ISSUE DECIDED BY THE ALABAMA SUPREME COURT BELOW.

In United States v. Caceres, 440 U.S. 741 (1979), this Court held that the Fourth Amendment's exclusionary rule afforded no

protection against violations of Internal Revenue Service administrative regulations because the Repondent enjoyed no right of privacy under either the United States Constitution or federal law. This Court said that tape recordings obtained when an I.R.S. agent monitored his face to face conversations with the Respondent need not be suppressed under the Fourth Amendment. The Alabama Supreme Court did not hold, as the State insists, that any violation of Alabama's "knock and announce" statute was, ipso facto, a violation of the Fourth Amendment. Instead, the Court below held only that the officers' failure to comply with that statute could not be judged by a standard which would be reasonable or acceptable for business or social visitors,

but rather that it must be judged according to the facts and circumstances known to the officers at the time of their attempt to execute the search warrant. As the previous argument points out, the decision of the Alabama Supreme Court was based upon the application of state law to its factfindings. Thus, we perceive no basis for the State's assertion that Caceres conflicts in any way with the decision below, and certiorari should be denied.

III. NO IMPORTANT OR NOVEL FOURTH AMENDMENT QUESTION IS PRESENTED BY THE DECISION OF THE ALABAMA SUPREME COURT.

While it is axiomatic that evidence obtained in violation of the Fourth Amendment is not admissible in state

proceedings, the decision of the Alabama Supreme Court below that the evidence seized should have been suppressed was not based on the Fourth Amendment, but upon its finding that the facts and circumstances known to the officers at the time they attempted execution of the search warrant did not justify their failure to comply with the "knock and announce" statute.

Daniels v. State, 391 So.2d 1021 (Ala. 1980), cited by the Alabama Supreme Court in the instant case, "recognize[d] that fundamental constitutional principles for privacy of the home foreclose[d] any 'grudging application' of our State statute." 391 So.2d at 1023. But neither Daniels nor the instant case held that a violation of the statute was a violation of

the Fourth Amendment, contrary to Petitioner's assertions. Clearly, Mapp v. Ohio, 367 U.S. 643 (1961), did not "obliter[ate] . . . state laws relating to arrests and searches in favor of federal law," so long as constitutional rights are not abridged thereby. Ker v. California, 374 U.S. 23, 31 (1963). Alabama's decision to suppress evidence because it was seized in violation of its "knock and announce" statute did not violate Gannaway's rights under the Fourth Amendment; thus, no issue has been presented as to the scope and effect of this Court's previous rulings under the Fourth Amendment and certiorari should be denied.

IV. THE OPINION BELOW IS NOT INCONSISTENT WITH SEGURA V. UNITED STATES, ____ U.S. ____, 104 S.Ct. 3380 (1984).

In a supplement to the original petition, the State argues that the opinion below conflicts with this Court's intervening decision in Segura v. United States, _____ U.S. _____, 104 S.Ct 3380 (1984), because Segura declared admissible evidence seized pursuant to a valid warrant even though police officers had effected an illegal entry into the apartment one day prior to the execution of the search warrant. No conflict exists because Segura, decided pursuant to the Fourth Amendment, did not address the admissibility of evidence obtained pursuant to a search warrant executed in violation

of state law. As the Court's decision below was based upon a violation of state law, no conflict with Segura exists, and certiorari on this issue should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent urges this Court to deny the Petition for Certiorari.

Frances Heidt
Frances Heidt

John C. Falkenberry
A Member of the Bar
of this Court

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, John C. Falkenberry, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the Respondent, do hereby certify that on this 12th day of December, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for the State of Alabama, Petitioner, by mailing same to them, first class postage prepaid and addressed as follows:

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John C. Falkenberry

NO. 83-1796

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

LEWIS L. GANNAWAY, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

REPLY BRIEF AND ARGUMENT

OF

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REPLY ARGUMENT

The Petitioner hesitates to burden this Honorable Court with a brief in response to such obvious attempts to evade the inescapable as are presented in the Respondent's brief. However, a short response will at least serve to prevent these arguments from going unchallenged.

I.

IN GENERAL

The issue in this case was first raised by the Respondent's Motion to Suppress, which he filed in the Trial Court. This motion expressly relied on the Fourth Amendment to the United States Constitution. See the language quoted from the Respondent's motion in footnote 1 at page 5 of the Petition. Throughout the litigation in State court the Respondent's two part argument was:

1. The officers violated Section 15-5-9, Code of Alabama, 1975, and

2. Therefore, they violated the Fourth Amendment to the U.S. Constitution.

The State's response was:

(1) The officers did not violate the state statute, and,

(2) even if they did, they did not violate the Fourth Amendment.

The Alabama Supreme Court accepted the Respondent's argument, holding that the state statute was violated and, relying on not less than four federal cases and one state case (a case which relied exclusively on the Fourth Amendment and federal case law), held that a violation of the state statute constituted ipso facto a violation of the Fourth Amendment. Four justices dissented on

Fourth Amendment grounds. The basic issue presented by the instant petition is:

> "Does the Fourth Amendment require the suppression of evidence found in accordance with the Fourth Amendment but in technical violation of a state statute relating to the execution of search warrants?"
>
> (Petition, page I)

Now, the Respondent, who relied on the Fourth Amendment throughout the state court litigation and prevailed thereon, suddenly discovers that the Fourth Amendment has nothing at all to do with this case. This is absurd.

The Respondent's claim that the Petitioner is raising factual issues is shown to be false by the Statement of the Facts contained in the Petition (pages 9-14), which consists entirely of quotations of the findings-of-fact from the opinion of the Court of Criminal Appeals of Alabama, which the Alabama Supreme Court accepted, and quotations from the Supreme Court's own opinion. The Petitioner is not questioning the state court findings-of-fact but is, indeed, relying on them.

The Respondent says that United States v. Caceres (440 U.S. 741, 59 L.Ed. 2d 733, 99 S.Ct. 1465 [1979]) and Segura v. United States (___U.S., ____ L.Ed.2d ___, 104 S.Ct. 3380, 52 U.S.L. Wk 5128 [1984]) are not in point. Admittedly, if Segura had been available when the original Petition was filed, the Petitioner-State would not have relied

nearly so heavily on Caceres as it did. This is not because Caceres represents bad or inapplicable law but because Segura is "on all fours" with the instant case. See the Supplemental Petition. The only difference between Segura and the instant case is that in Segura the warrant was obtained after the illegal entry, while here the valid warrant was obtained prior to the technically illegal entry. Segura is obviously controlling in this case.

II.

THIS CASE PRESENTS AN EXTREMELY IMPORTANT ISSUE OF U.S. CONSTITUTIONAL LAW

As pointed out in the Petition (pages 31-37) the lower federal and state courts consistently apply the Fourth Amendment decisions of this Honorable Court relating to searches incident to

warrantless arrests in homes[1] to arrests and searches pursuant to valid warrants. The Petition discuses five of these lower court decisions (pages 34-35), which were relied on by the Alabama Supreme Court, and these five represent hundreds of similar holdings. These holdings cannot be reconciled with Segura v. United States (___ U.S.___, ___ L.Ed. 2d ___, 104 S.Ct. 3380, 52 U.S.L. Wk. 5128 [1984]), but Segura does not mention this Honorable Court's earlier cases on warrantless entry. This is because, as argued in the Petition, these cases are irrelevant to searches under warrants. However, it is obvious that the prevailing rule in the lower courts on

---

[1] Miller v. United States 357 U.S. 301, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1958); Ker v. California 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963); Sabbath v. United States 391 U.S. 585, 20 L.Ed.2d 828, 88 S.Ct. 1755 (1968)

a point which commonly arises is utterly inconsistent with the policy of this Honorable Court. This case then presents an issue of U.S. Constitutional law of extreme importance to the nation as a whole.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, again respectfully submits that the decisions and opinions of the Honorable Supreme Court of Alabama in this case and of the Court of Criminal Appeals conforming thereto, present conflicts with prior decisions and opinions of this Honorable Court and incorrectly resolved several novel questions under the Fourth Amendment. For these reasons, the Petitioner again prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts to the extent that the same hold that the conduct of the officers in this case compelled the suppression of the evidence they found under the Fourth Amendment Exclusionary Rule or, in the

Alternative, will vacate and remand this cause for reconsideration in light of the later Segura v. United States, above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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